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THE PROPER PROVINCE AND OFFICE OF CONSTITUTIONAL LAW.

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The wise Bacon, in "marshalling the degrees of sovereign honor," gives the first place to the founders of states and lawgivers, that is, to the publicists and statesmen who establish the fundamental law of the people. As the field is worthy of the highest ambition, so is the subject full of deep and momentous interest. It deals alike with the greatest nation and its humblest citizen; it controls life, liberty and property; in its study have been gathered all the treasures of philosophy and history; in its development have been waged wars and revolutions; through it have come self-government and free institutions as the crowning triumph of a progressive civilization. To us of Anglo-Saxon blood, whose heritage is centuries of conflict over constitutional law, who here have wrought out in fullest development the precious liberties it can give, it never is inopportune to dwell upon the subject or to discuss any of its many phases.

I take then as my subject "The Proper Province and Office of Constitutional Law," meaning not to consider constitutional law in its breadth and detail, but rather the limitations upon it, and especially its sphere as distinguished from statute legislation.

The modern tendency in many of our states frequently to change their constitutions, the birth and growth of new schools of political thought, each clamoring to have its policy engrafted into fundamental law; the development and clash of powerful class influences struggling for control of the body politic; the undisputed right of the majority to make its will law—these suggest, as pertinent and pressing, the inquiry, how far shall a constitution—itself a limitation upon the power of the people, itself organic, supreme, permanent—be used to register the will of the then majority, and to restrict, control or supersede statute legislation? The question is not as to the merit of any proposed measure, nor as to the right of the people to make it law, but only where in law is its proper place. The fact that in our greatest state there is now in session a constitutional convention, which, in dealing with the wishes and wants of her conservative people, must be confronted with this fundamental inquiry, may give a present, practical interest to its consideration.

Necessarily the question reaches far back into the past. Who can determine the scope of constitutional law in ignorance of its sources? Or fix its proper limitations without regard to history or precedent? "Constitutions are not made, but grow," are the familiar words of Sir James MacIntosh, and true alike of written and unwritten law. "The American constitution," says our ablest English critic, "is no exception to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly every institution has grown, so much the more enduring it is likely to prove. There is little in that constitution that is absolutely new. There is much that is as old as Magna Charta." And he calls "the spirit of 1787," when our national constitution was drafted, one "which desired to walk in the old paths of precedent." "No one familiar with the common law of England," says Mr. Justice Miller, "can read the constitution of the United States without observing the great desire of the convention which framed that instrument to make it conform as far as possible with that law."

"Although the framers of our constitution," says a recent

writer, " were without any grasp of the modern conception of the historical continuity of the race, they revered the ancient constitutional traditions of England. And thus it came to pass that Magna Charta, the acts of the long Parliament, the Declaration of Independence and the constitution of 1787 constitute the record of an evolution."

It is easy but hardly necessary to multiply these authorities. Mr. Stevens, in his able work on the sources of our constitution, has carefully collated many of them to establish the fact of the " historical development " of state and national constitutions from " the English constitution itself, considered not merely as a theory or an ideal, but as a contemporaneous fact, and as an essential element in American political experience." And our own Lowell, who, perhaps, better than any American, has understood and stated the vital principles and high ideals of our Democracy, notes, as the key to the success of our constitution, that its framers " had a profound disbelief in theory, and knew better than to commit the folly of breaking with the past. They were not seduced by the French fallacy that a new system of government could be ordered like a new suit of clothes. They would as soon have thought of ordering a suit of flesh and skin. It is only on the roaring loom of time that the stuff is woven for such a vesture of thought and expression as they were meditating."

The evolution of our constitutional law, while it cannot be stated with scientific precision, still can be traced back through certain definite stages which mark its growth and progress. We can see through the dim vista of centuries the germ developing ever into higher and more perfect life; we can note its struggle and the constant survival of its fittest elements; we recognize the paternity, trace the ancestry, though unable always to determine just when and why it acquired a specific character.

Our national constitution sprang from our pre-existing state constitutions, and was the work of educated statesmen thoroughly grounded in their principles. The state constitutions were the outgrowth of earlier colonial charters and constitutions, and embodied the fundamental principles and rights

which had dominated our colonial life, and found full expression in such typical instruments as the Massachusetts body of liberties of 1641 and the later Virginia bill of rights: Contemporaneous with this early constitutional life, yet, also, long before it, as its source and soul stood the common law and constitution of England. The work of centuries wrought out in battle and bloodshed, establishing precious rights each the concentrated result of a mighty agitation, they had become the guaranty of our liberties, a controlling influence of our life, culminating in our Declaration of Independence and revolution, because the mother country disregarded these rights which her own law had given us.

The Bill of Rights of 1689, the Act of Settlement, the *Habeas Corpus* Act, the Petition of Right, and Magna Charta, first and greatest of all, governed us, whether in England or of England, with the same authority as others of Anglo-Saxon blood. Coke in maintaining the independence of the judiciary against royal interference: Sir John Eliot, Pym and Hampden in their contest with Charles I, were asserting principles of self-government which for all time were to be the very foundation of republican institutions; and the bold Barons at Runnymede, wresting from their King a limitation on his power, and a recognition of rights in the governed, were blazing the path for modern constitutional law. We but share the fruit of a struggle "into whose labors we have entered."

How fully the early colonists recognized and asserted their right to share in the laws and liberties of England is seen in their official action.

Massachusetts, in a petition of the General Court to Parliament in 1646, asserted that her government was framed according to her charter "and the fundamental and common laws of England," and the proof was given, says Mr. Stevens, "by setting forth in parallel columns the fundamental laws of England from Magna Charta and their own laws." As early as 1635, in answer to the demand of her people for a written constitution, the duty was entrusted to a commission to frame "a body of grounds of law in resemblance to a Magna Charta."

Virginia, in 1619, had esaablished her own Assembly or

Parliament, whose example, Story says, "was ever afterward cherished throughout America as the dearest birthright of freemen." Two years later from the company in England came her written constitution, "the earliest for an American commonwealth . . . modelled after the unwritten constitution of England, . . . the historical foundation of all later constitutions of government in this country." In 1623 she asserted her exclusive power of taxation, and in 1651, by treaty with the long Parliament, obtained full recognition of her right to self-government.

Connecticut as early as 1639, assuming the authority, established her government, "the first written constitution" ever enacted "by the independent act of the people."

In Maryland, in 1638, it was enacted "that the inhabitants shall have all their rights and liberties according to the great charter of England."

Similar provisions will be found in the charters and early laws of all the original colonies. In legislation and action the colonists asserted their right to the "liberties, franchises and immunities" of England who "had given them her law, her language, her religion and her blood." Thus we trace back our legal ancestry through the centuries. The English constitution was our constitution; the colonial charter was "a sort of skeleton constitution which usage had clothed with nerves, muscles and sinews till it became a complete and symmetrical working system of free government;" and our later constitutions, national and state, sprang from the same common source, deep-rooted in ancient English institutions.

And now we stand at the close of more than a century of free, independent, constitutional government, with the battle of civil liberty won and its results established in permanent law. I need not in this presence trace the history of the conflict. It is sufficient to recall that it marks a long and slow, though mighty, evolution. If we cannot find the earliest germ of constitutional law, we can see its development, note the influence upon it of many a master mind from Aristotle to John Adams; point out the great land marks of its progress, and then confidently declare it not a manufacture or invention, but

the necessary outcome and growth of the past intelligently developed and applied to the present. As progress has been its vital principle as thus it lives and moves and has its being, so will it surely in the future, as in the past, readily adapt itself to the need of society and the demands of civilization and national growth.

The reader remembers the thought expressed by Sir Henry Maine, that society, in its opinion and necessities, is always in advance of law; that the progress of the one and the stability of the other make a gulf between them, often closing, often opening; but that "the greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed." The same principle is recognized by a later writer, who declares that "the close affiliation existing between the organic law and the historical life of any country is the one fundamental condition which insures the endurance and flexibility of that law. Indeed, the constitution can hardly be regarded as the organic law unless it be a true expression of the organic life of a people." Organic law cannot be "made to order," nor "a successful government introduced into a country by mere importation."

"No social organism can accept as the law of its being an empirical constitution made to order as a theoretically perfect solution of the problems of political life. The fact has been too little recognized that the evolution of society involves the development of institutions."

If constitutions grow, ever developing to meet the larger life of a progressive people, and to bring that life under the reign of law rather than force it discontented to the point of revolution, which, after all, may be, as Spencer says, but "the act of restoring equilibrium" where "incongruity between character and institutions is the disturbing force," we must assume that unchangeableness is neither a necessary condition of the stability of a constitution, nor a certain test of its success. Yet, it may be true, is true, that with us the fundamental principles of constitutional law are permanent and the lines are marked which should define and limit its change and growth. The child changes, grows to cope with the tasks

and responsibilities of manhood; but the evolution of centuries determines the law and limits of his growth, and makes it normal, healthy, leaving within them ample room for his activity. So safety and strength depend not upon the rigidity of constitutional law which may stunt the life of the social organism, but rather upon a flexibility itself controlled by fixed and fundamental principles.

Recognition of this fact makes it easier to deal with the problems of our day.

We live in an age of unprecedented material progress and marvelous scientific and physical development. Inventions, bridging the separation which time and distance create, have brought nations into closer touch and vastly broadened the field of human effort and ideas. Science, daily turning labor from muscles to machinery, and wealth, with its accumulations and power, sharpening the line of class distinctions, both furnish work for the economist and statesman. General popular education, with the school, the church, and public discussion everywhere, and a free press with its mighty power, have given intelligence activity, and made agitation the forerunner of progress and law. Even bayonets seem to flash with thought, striving now less for conquest than for peace and law and order. Under these conditions it would be strange, indeed, if social progress, accelerated by material prosperity and voicing aloud and everywhere its needs and wishes, did not seek the "lawful revolution" of constitutional change; strange, too, if the individual, with his fuller power and keener intelligence, in the universal struggle for improvement, for a larger opportunity and more of liberty and happiness, were content to measure his rights and claims by the fundamental law of the present or the past, rather than by such changes as shall more fully embody the great principles of justice, equality and humanity which have come down to us alike from the "rugged sides of Sinai" and "the gentle slopes of Olivet." The ideas of our progressive age and liberty loving people have no more crystallized into a full and final development of constitutional government than has religion in the creeds and apologetics of the medieval ages. "More light," says Robin-

son, "will constantly break forth from God's word." But the dark and narrow creed which could not let the daylight in bred schism and heresy; and the world applauded and progressed. More light is constantly breaking forth from a progressive democracy, which, if excluded from a rigid constitution, may find a place in discontent and revolution.

We need not be disturbed then if as lawmakers we find ourselves confronted with problems new, perplexing and momentous. They may be but the evidence of life, activity, progress in the body politic, and an inspiring test of our wisdom, courage and patriotism. If on the one hand we stoutly resist the demand that constitutional government shall either abdicate in favor of anarchy, or assume the paternal duties of the patriarchs of tribal days, or the later village communities, let us not on the other hand give way to that unprogressive conservatism which sees danger in the slightest movement of the ship of state, though it be but the paying out of sufficient cable to allow her to breast the rising winds and tides with safety and success. Between the two is a safe and proper course, which we can take, fearing not the gorgon head of anarchy, nor the wrinkled face of Bourbon conservatism, nor even the siren voice of socialism and paternalism.

We recognize the right and need to narrow or bridge the gulf between society and law; but insist that this cannot be done either by the abrogation or stagnation of law or by substituting it for the functions of society. It can be done by change, and safely, wisely, when such change is of law; and, if of organic law, within the lines which mark its proper scope and office.

And so, after some wandering, we come back to the path upon which we entered this broad field of constitutional law. We have found that our subject takes us far back into the past; that constitutional law has been an evolution out of centuries of strife and progress; that this history is our history; and that in our colonial days and later "the constitution of the mother-land had been more than an ideal model; it had been a vital factor in the life of the American people."

We have observed that growth is its constant rule, and will be so long as society advances; that its change in our progressive age is natural, often necessary—but that such change is or ought to be upon fixed principles which define and limit it.

To ascertain these principles we must consider the purpose and object of constitutional law, and again turn to history and precedent for its origin and evolution.

A constitution is government and government by law, establishing its principles, dividing and regulating its powers and directing its administration. The purpose of a constitution "is to establish a framework of government and to provide in outline for its powers and functions." As government merely, it has existed since man's creation; however crude, tyrannical, or paternal, it has sought to regulate his relations to his fellow men as members of society which it controlled. We need not follow John Locke in his discussion with Sir Robert Filmer back to the Garden of Eden, where he finds a justification of despotic government in the power there conferred upon Adam, to be convinced that government is as old as the human race, and that its primal principle was control, pure and simple. Then through ages of evolution and revolution grew a second great principle—that of compact, consent, with a recognition of the governed as well as of the governing class.

Without attempting to trace the evolution in the dimness of the past, we can see three stages of development in government before the principle of compact was established. First, the paternal control of the era of Abraham, Isaac and Jacob over a pastoral life and country thinly populated, where the only constitution necessary was the paternal word. Then as the people multiply and segregate in tribes, we see paternal merging into tribal government, yet, still control, arbitary and unqualified. Such was the theocracy ruling the tribes of Israel. There is no hint of compact or consent in the Ten Commandments, or in the regulations established for the "chosen people." The law of the Pentateuch is only "thou shalt" and "thou shalt not." Then with increasing population and its closer union came the dawn of national life, and

with it the germ of compact, the first faint recognition of the right of man to a voice in the government which ruled him. History does not tell us when this germ originated. Left to surmises, we may fancy we see it developing upon the plains of Troy, in the haughty rebuke of Ulysses of Thersites:

> But if a clamorous, vile plebeian rose,
> Him with reproof he checked or tamed with blows.
> Be still, thou slave, and to thy betters yield,
> Unknown alike in council and in field.

Certainly it was early found in national government, and once there it could not be eradicated. Neither the inroads of Goths and Vandals, nor the regime of ecclesiasticism, nor the servility of feudalism, nor the divine right of kings could destroy it—only at best check for a time its growth.

So constitutional law established on the principles of control and compact grew and developed. While we appreciate the influence upon it of Greece and Rome with their recognition of some of its fundamental principles, we know that our constitutional law comes not so much from these classic sources as from our fighting Anglo-Saxon forefathers. In their blood was less of submission than assertion. Out of their contests came rights by consent to supplement control by authority, and make a well-rounded government. Henceforth control was tempered by compact. Thus came Magna Charta, the basis of liberty and self-government of the seven succeeding centuries. "Do they think I will grant them liberties that will make me a slave," said King John, when the demand of the barons of Runnymede were made known to him. Then, yielding to a power he could not resist, he gave his assent "for the sake of peace" he said, "and the exaltation and honor of the kingdom." Here was the battle between absolute power and the right of the governed, between control and compact. Absolutism had made its last stand, and the victory of the barons placed the principle of compact in the constitution as a controlling force forever for the Anglo-Saxon race. So Magna Charta declared over the signature of the King: "To all our free subjects of the kingdom of England, we, for ourselves and our heirs forever, have granted all the underwritten

liberties, to be had and to be held, by them and their heirs, from us and our heirs."

Thus developed the two fundamental principles of constitutional law; control, to establish government and to determine its framework, but modified now by compact, to guard the rights and liberties of the governed and to give them a part in the making of law. Their constitutional bulwark was no longer to be but the uncertain and unstable pledge of the coronation oath. Control now meant representative institutions—a Parliament, and division and limitation of authority; now had come the dawn of self-government. True, Magna Charta and the Parliament of Simon de Montfort had not ended the conflict nor completed the work, but they had established a permanent principle, potent in influence and certain of growth. Kings might insist upon absolute power, but were forced by the people to constant reaffirmation of the great charter, with larger liberties for the people and further limitations on the crown. Control by Parliament of taxation and law, trial by jury, imprisonment only by warrant and responsibility of the king's officers were some of the principles evolved by the time of Henry VII out of the protracted struggle. A Henry VIII might still, with the consent of a submissive Parliament, call royal proclamations law, and establish the star chamber; the Stuarts might plead again the divine right of kings, and servile judges might deride the power of Parliament as a "king-joking policy;" but they were only paving the way for petitions and bills of right, and *habeas corpus* and succession acts, and inspiring the Cokes and Hampdens and Cromwells to assert the rights of the governed, and to make compact, consent, the dominant power of their organic law and freedom its inevitable result. No longer was it true, as the Commons had once meekly declared, that "prerogatives of princes may easily and do daily grow; the privileges of the subject are for the most part at an everlasting stand." Constitutional law was developing out of the conflict; nay, more, was, with its precious rights and liberties firmly established, and a king had suffered death "for subverting the constitution of the realm."

Such work and struggle, let us not forget, were the begin-

ning and basis of our American constitutions, as they were also the precedent, justification and incentive for our revolution and national existence. The thirteen colonies, now independent in fact, were wholly dependent in law, upon their charters and the constitution and common law of England. This made with them constitution building a necessity. I have already sketched the connection of our early charters and later constitutions with the organic law of our English ancestors. In them is the same recognition of the principles of control and compact, only with larger growth and fuller development.

Out of the necessity and principle of control has come our frame of government, national and state, with its divisions and functions carefully arranged and specified; and control modified by compact has made this representative and self-government. All that secures this, necessarily, has place in a constitution, because, necessarily, fundamental law; and within it, as even more fundamental, are properly found regulations of the suffrage, by whom and how it shall be exercised. The constitution of the body politic must precede the exercise of power by it, and if not as permanently fixed as the law it makes, becomes the helpless subject of its own creation. Any policy, therefore, approved by the people, which deals with the qualifications or exercise of the suffrage, or affects the frame of government or changes its scope or functions, has its proper place in constitutional law. Should, for example, the doctrines of Socialism or Nationalism ever prevail, they should, because of their radical change of the purpose and principles of our government, find expression in constitutional law. Our excellent Australian ballot law, controlling the exercise of the fundamental right of suffrage, might well have its principle embodied in the constitution, leaving its details for legislative enactment.

A constitution then necessarily defines the body politic and creates a government, and properly contains in principle, at least, whatever law is to control them. But it also must secure individual liberty so far as is consistent with such government and the rights of others, recognizing, in the words of Herbert Spencer, "that every man may claim the fullest liberty to

exercise his faculties compatible with the possession of like liberty by every other man;" that "a Democracy is a political organization modelled in accordance with the law of equal freedom," and that "of all institutions which the imperfect man sets up as supplementary to his nature, the chief one must have for its office to guarantee his freedom."

Out of the principle of compact sprang this constitutional safeguard of liberty. Making government rest upon consent, it made a condition of such consent protection of an individual or minority in certain rights against the dominant power, be it king, parliament or a majority. A sovereign people consented to limitations on the exercise of its sovereign will.

Controlled by these two principles, every American constitution embodies two fundamental ideas—a frame of government and body of liberties—the one to provide for the full exercise of power by a majority, except as limited by the other to guarantee the free exercise of rights by the minority. I need but briefly refer to the detailed provisions, for my purpose is not to enumerate the contents of a constitution, except as may be necessary to illustrate its sphere and function. They are clearly stated in the Massachusetts constitution of 1780, which was the type substantially followed by other states. The frame of government naturally provided for three distinct and independent departments—legislative, executive and judicial. This was in accord with the then widely accepted philosophy of Montesquieu, the authority of Blackstone, the real principles of the English constitution, and with our past experience. In England, at the time of our early constitution making, the three powers had long since ceased to be centered in the king. Out of her experience and emancipation the French philosopher and English jurist had evolved and declared the principle that liberty depended upon the separation of these powers. Earnestly believing in self-government and liberty, the framers of our constitutions made the legislative department thoroughly representative, and the all important, responsible branch of a republican government, with power, subject only to constitutional limitations, frequently and fully to enact the people's will. The other two branches, equally necessary and co-equal in

rank, in legal effect were merely agents to enforce legislative action within the sphere of its power. The judicial department could create no right. Its power was limited to the construction of written or unwritten law. The highest jndge was as much hemmed in by law as the humblest criminal in the dock. Equally limited in its scope was the power of the executive department to supervise the administration and enforcement of law. The three departments were independent, each supreme within its jurisdiction, and yet the law making power was clearly and designedly the dominant branch of government.

These necessary powers of a constitution, determining the frame and scope of government, suggest control rather than liberty, however representative our institutions. Government compels submission to its authority, but its compulsion also necessitates a guaranty of protection, especially against the arbitrary action of any of its departments. We need not base this guaranty on Rousseau's theory of a social contract where "allegiance was agreed to be exchanged for protection;" nor upon Spencer's extreme extension of the law of equal freedom, which "admits the right of the citizen to adopt a condition of voluntary outlawry." We claim it through our Anglo-Saxon ancestors who wrested it by force from rulers, and made it as permanent and potent as government itself.

At the time of our national independence the evolution of constitutional law had reached the definite point that popular rights, as against the ruling power, could only be intrusted to established written guarantees, and that these were as necessary in a popular government vested in a majority as one of a more absolute character. Such guarantees, therefore, were embodied in our written constitutions, and covered what were felicitously called in our declaration "certain unalienable rights with which man is endowed by his Creator, among which are life, liberty and the pursuit of happiness."

These are more fully set forth in the constitution of Massachusetts as "the right of enjoying and defending life and liberty, of acquiring, possessing and protecting property; in fine of seeking and obtaining safety and happiness," and specifically stated to include freedom of conscience and worship,

trial by jury, right of petition and self-government, freedom of debate and the press, freedom from improper arrest and martial law, right to compensation for property taken for public uses, and other rights equally familiar.

To these provisions, establishing government and guaranteeing rights, were added certain fundamental duties of government to its constituency, which were clearly and universally recognized as necessary to secure public safety and happiness, and so were imperatively enjoined upon the sovereign power by the organic law, as *e. g.*, the duty of cherishing public schools and the interests of literature and the sciences.

These general principles and provisions cover the whole scope and extent of our early constitutional law and clearly point out its limitation, and the lines of its progress and development. They leave great latitude to the people for legislation; and seem to recognize almost as a third great principle of constitutional law, certainly as a deduction from the principle of compact and self-government the right of the people frequently and easily to change their laws. This is expressly declared in the constitution of Massachusetts. It means that as needs appear and the state develops, as new policies or beliefs are accepted by the people or, in its own words, "as the common good may require" there shall be opportunity to make them law. As the occasion arose, there was to be unrestricted power to deal with it. The constitution was not like a rigid creed to be a barrier to shut out "the more light" which marks the progress as well of society as religion; nor yet was it to be as changeable and unstable as the legislative will. But broad in its scope, without unnecessary restrictions, general, expansive in its principles, simple and terse in its provisions, it was in fact to be permanent, fundamental law, rather than a restraint upon legislation, or itself legislation, or the instrument to enforce the will of temporary, fleeting majorities. It was to establish the lines of government rather than do the work of governing; that was left to the instruments it created.

This limited sphere of organic law is clearly seen in our national constitution. It created a government of specified

powers granted by the states, but absolute within their scope. In the statement of these powers and in guarding individual and state rights, it closely followed the form and primal principles of the earlier state constitutions. It does not undertake to legislate or to limit legislation except of states where necessary for national supremacy; but is content in terse and comprehensive language to establish a frame of government, define its powers and then declare its body of liberties. In less than thirty words it created our whole national judicial system, not by elaborate specification, but by grant of ample authority to its legislative branch. In eight words it established the admiralty and maritime jurisdiction of its courts, giving by the very absence of detail the power to its judicial department to meet the pressing exigencies of the country and its progress, and, by magnificent judicial evolution, to broaden this exclusive jurisdiction from the ebb and flow of the tide, so as to cover every league of navigable water within our continental domain.

It would be easy to multiply similar illustrations from national and state constitutions, showing their purpose to be on broad lines to establish government and safeguard rights, leaving detail and enforcement to legislation, and the people free to act through their representative institutions under a limited restraint; and recognizing the fact that the needs of a progressive social organism can better be met by freedom from constitutional limitation than by constant constitutional change.

The unwritten constitution of England, wholly under the control of a sovereign Parliament, flexible, expansive, yet with permanent principles and rights, has readily, safely permitted a growth and change of institutions with the progress of the nation, even enabling her in 1832, "to carry through a political revolution under the guise of legal reform." While in England, as Mr. Dicey points out, "laws are called constitutional because they refer to subjects supposed to affect the fundamental institutions of the state, and not because they are legally more sacred or difficult to change than other laws," and while with us both tests are present, but the latter supreme—yet there and here the truth has been recognized

that "the endeavor to create laws which cannot be changed is an attempt to hamper the exercise of sovereign power;" and so "tends to bring the letter of the law into conflict with the will of the really supreme power in the state." We obviate this difficulty, not by putting our constitutions within the control of the legislative power, trusting only to its conservatism to uphold fundamensal rights and principles, but reserving these with reliance on a supreme judiciary for their maintenance, we have found safety and growth by giving the people ample power to legislate, and yet have insured the stability of rights and institutions.

Our national constitution is an excellent illustration of the success of this policy. Its system of constitutional government, with its comprehensive general principles and broad powers sufficiently elastic to allow of expansion by proper construction, yet sufficiently distinct to be effective and protective, has stood the test of more than a hundred years, carried us through foreign wars and civil conflict, adequately met a phenomenal increase of population, wealth and area, with its new and momentous questions, skilfully adjusted the delicate relations between state and nation, and governed as efficiently 70,000,000 of people scattered through forty-four states, reaching from ocean to ocean, as the small population of the narrow coast line which embraced its thirteen original constituents. Yet during ninety years of this marvellous growth and change, it has required no amendment except to make permanent the grand results of the civil war. Speaking of this act of the sovereign power of the United States, says Dicey: "It needed the thunder of civil war to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity." If so I may add it will not be because "the monarch slumbers," but because he is contented, Admirably has the national constitution fulfilled its purpose "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty," all proper, necessary constitutional duties. Its success has demonstrated that a constitution, to be efficient and

permanent, and yet adapted to the progressive development of the future, should be comprehensive, not minute; contain principles, not measures; establish fundamental rights, not petty restrictions; give large powers to its departments, and leave specific legislation, which may be the transient product of spasmodic excitement, not the people's will, but their whim, within their power freely to control.

An examination of our numerous state constitutions will show that in recent years there has been a marked tendency in the opposite direction. I have not time nor you patience to consider the facts in detail. A few references will be perhaps sufficient.

Down to about 1850, all of the state constitutions, following, substantially, the models of Massachusetts, Virginia and the United States, contained only a bill of rights and a frame of government, the latter established under comprehensive provisions, upon a broad basis and with large powers. Thereafter, and in a constantly increasing degree, these constitutions grow longer, more elaborate and detailed, especially in their restrictions upon legislation and in the exercise therein of legislative powers. This tendency seems to have been most marked about 1850, from 1870 to 1875, and in the new constitutions of the last few years; and, while widely prevalent, to have found fuller expression in the West and South. Let me give a few typical illustrations of each period. The constitution of Illinois of 1848, increasing in length in the ratio of eight to eighteen, finds room for minute provisions as to tax sales, and, in six sections, for regulation of corporations. The constitution of Ohio of 1851, nearly twice as long as its predecessor, restricts the power of the Legislature over corporations, and itself defines their duties and liabilities. The Indiana constitution of the same date forbids the Legislature to pass local laws in seventeen specified cases, and in fourteen sections legislates in reference to corporations. Coming to a later period, we find the Illinois constitution of 1870 making elaborate limitation on the power of the Legislature, and very detailed legislation for the regulation of warehouses, railroads and corporations generally.

The Pennsylvania constitution of 1873 devotes thirteen sections to the regulation of private corporations, and twelve more to railroads and canals, and gives more than one-seventh of its entire length to detailed limitations on the power of the Legislature. The Missouri constitution of 1875, having grown since 1820, in the ratio of 11 to 31, legislates at great length upon these subjects, and minutely provides for the municipal government of St. Louis. The California constitution of 1879, among many details of legislation, prescribes the hours of labor on public works, defines mechanics' liens, and forbids any corporation, directly or indirectly, to employ any Chinese or Mongolian in any capacity. Coming to the latest period, we find the Mississippi constitution of 1891 almost a code of laws. It contains 285 sections, covering forty-seven octavo pages. With much detail it both forbids the Legislature to pass laws upon certain subjects and requires it to legislate upon others, as *e. g.*, the provisions (sec. 83) that "the Legislature shall enact laws to secure the safety of persons from fires in hotels, theatres and other public places of resort," and (sect. 186) "pass laws to prevent abuses, unjust discriminations and extortion in all charges of express, telephone, sleeping car, telegraph and railroad companies," etc., and (sec. 198) "laws to prevent all trusts, combinations, contracts and agreements inimical to the public welfare." It also incorporates the whole of an employers' liability act, requires any railroad thereafter constructed within three miles of any county seat to pass through the same, and establish a depot therein, regulates the expenses of criminal prosecutions, provides that the state printing and stationery shall be furnished under contract, that the state librarian may be a woman, and for numerous other details of government usually covered by statute law.

Instructive of the tendency of this period are the very voluminous and detailed constitutions adopted in 1889 by the new states of Montana, Washington, North and South Dakota. They seemed to be based on the belief that the political panacea for all the evils which have beset legislation in the older states is to put it into constitutional law largely beyond reach of the people. A friendly critic, reviewing them, says:

"They approach a code of laws, rather than a resume of governmental principles. They will prove unwieldy in practical administration, because they attempt to prepare the state for a great number of detailed labors. The framers seem to have thought that the governments would, at best, be intrusted to untrustworthy officials, and that it was wise, if not necessary, to set forth the details of state government, even to the definition of such terms as monopolies and railroads." He wisely adds: "A constitution aims to be a chart, based upon a large amount of experience in the conduct of government. But a constitution is not intended to teach a system of legislation, or to discuss passing problems in transportation." As one reads in these constitutions the many restrictions upon the legislative power, he is almost inclined to believe that this department was established for the purpose of declaring what it could not do, and is reminded of Dickens' Circumlocution office, whose only power was "how not to do it."

In North Dakota, ninety prohibitions are placed upon the Legislature in the single matter of special legislation; forty-five in South Dakota, and about as many more in the other two states. The courts are established and their jurisdiction defined with the detail and precision of a statute, the Washington constitution even fixing the time within which a judge must render his decision, and the North Dakota constitution requiring the Supreme Court to prepare a syllabus of the points adjudicated in each case. Apparently the legal members of the convention, whose influence, it is said, inserted this last provision, rely more on head notes than opinions, and were determined that these at least should be clear of *obiter dicta* even if necessary to invoke the power of the organic law of the state. The provisions in reference to corporations are most elaborate and detailed, and are substantially "a compendium of present corporation law, written by popular sentiment." By the creation of important administrative boards, and by the many restrictions on the legislative, executive and judicial departments, the tendency of these constitutions is to establish a sort of automatic permanent administration as a substitute for our usual form of government. This fact is

conceded by the thoughtful critic I have quoted, and is called by him a recognition in constitutional law of a "fourth department of government"—the department of administration. All but one of these constitutions provide for amendment or the calling of a constitutional convention by a majority vote of both branches of a single Legislature, ratified by a majority of the electors. Both Dakotas established constitutional prohibition after a popular vote—in North Dakota by a majority of 1159 in a total vote of nearly 36,000, thus making a permanent restriction on the people against the will of nearly one-half, and beyond their power to change, even when a majority, except by constitutional amendment.

I have referred to these constitutions somewhat at length because of the nearly 140 constitutions which have been framed in this country, they mark the widest departure from the fundamental principles of constitutional law hitherto generally accepted and adopted. I do not question the wisdom of enacting into law many of the provisions they contain, and certainly not the public spirit and high purpose of the men who framed them. But on grounds both of principle and expediency I seriously doubt the wisdom or propriety of this wide extension of the scope and office of constitutional law. These constitutions, in their numerous restrictions, in their avowed mistrust of representative government, in their excessive legislation placed beyond the convenient control of the people, in their violation of the principle of self-government, seem to have overlooked the fundamental idea upon which rests our constitutional law, and again to have set up the principle of government by control rather than government by compact. True, the control may be of a majority, not a king; but the vital question is not its source, but its extent. If it prevents the people from asserting their will, if it continues the reign of a departed majority, it is not in accord with the principles and institutions of our liberty-loving, self-governing people.

Certainly these constitutions depart from the wise advice given by our ablest authority on constitutional law. Said Judge Cooley to the North Dakota convention: "In your constitution making remember that times change, that men

change, that new things are invented, new devices, new schemes, new plans, new uses of corporate power. And that thing is going to go on hereafter for all time, and if that period should ever come which we speak of as the millenium, I still expect that the same thing will continue to go on there, and even in the millenium people will be studying ways whereby by means of corporate power they can circumvent their neighbors. Don't in your constitution-making legislate too much. In your constitution you are tying the hands of the people. Don't do that to any such extent as to prevent the Legislature hereafter from meeting all evils that may be within the reach of proper legislation. Leave something for them. Take care to put proper restrictions upon them, but at the same time leave what properly belongs to the field of legislation to the legislature of the future. You have got to trust somebody in the future, and it is right and proper that each department of the government should be trusted to perform its legitimate function."

The objections to this large and increasing extension of the province of constitutional law are serious and obvious. In the first place it seems to deny the existence of any fixed underlying principles which are to determine what a constitution should contain, and to make the supreme and only test the wish and will of the majority. Thus it opens the door, has opened it, to incorporating in a constitution the whole body of statute law. In doing this it necessarily removes from the immediate control of the people the power which governs them. It denies their right frequently and easily to change their laws, and so infringes the fundamental principle of self-government. What right, under our theory of government, has the majority of to-day, which to-morrow may be the minority, to impose its will unalterably on the then majority, except the right which relies only on might? But have not we of Anglo-Saxon blood for centuries fought that idea, and evolved the higher, safer principle, that government rests upon the consent of the governed; to be under the control, of course, of the majority, but a majority whose life and acts are themselves under the control of the people.

Otherwise it is neither a government of the people nor of a majority.

This modern constitutional growth, with its excessive government and its many restrictions firmly fastened on the people, seems also to conflict with the principle of freedom from restraint, which is the very essence of Democracy, finding expression in "such terms as free institutions, civil liberty and self-government." With its more of control and less of compact, it marks an evolution backward in the progress of civilization. "The time was," says Spencer, "when the history of a people was but the history of its government. It is otherwise now. The once universal despotism was but a manifestation of the extreme necessity of restraint. Feudalism, serfdom, slavery, all tyrannical institutions, are merely the most vigorous kinds of rule, springing out of, and necessary to, a bad state of man. The progress from these is in all cases the same—less government. Constitutional form means this. Political freedom means this. Democracy means this."

If this enlargement of the field of constitutional law is really, as suggested, the development of a fourth great department of government, that of administration, such a change, as affecting the frame of government, is within the proper scope of a constitution; yet it may be well to consider how far such department, placed by organic law beyond the control of the people, is in harmony with our institutions. It seems to bear some resemblance to the droit administratif of France, which has never taken deep root in Anglo-Saxon soil. While that law places the officers of administration largely beyond the jurisdiction of the courts, this fourth department would place administration itself beyond the jurisdiction of the people. Dicey says of the droit administratif that "it rests upon political principles at variance with the ideas which are embodied in our existing constitution," and that, "for each feature of it one may find some curious analogy either in the claims put forward or in the institutions favored by the crown lawyers of the Seventeenth century." Then commenting on the failure of the Tudors and Stuarts to establish this "strong administrative system," he declares it was "chiefly

because the whole scheme of administrative law was opposed to those habits of equality before the law which had long been essential characteristics of English institutions." May not we as truthfully say that a scheme of automatic administration, created by limitation of the powers of other departments, to be a substitute for and above legislation, is opposed to the long settled principles of Republican institutions? Is it not safer and better to make administration responsible to the people by leaving its system within their control? Then give it stability and efficiency by lifting its offices out of the spoils of politics, and making their tenure dependent only on merit and fitness.

Serious, too, are the objections on the ground of expediency to this tendency to put into organic law statute regulations which it may be wise frequently to change. One of two results must follow: either law, if unchangeable and discredited, loses its authority and the people become demoralized, or their constitution, often changing, loses its stability and fundamental law becomes the subject of constant agitation and controversy. Against this evil every constitution, until recent days, has sought to protect itself; first, by confining its scope within the limits of well defined fundamental principles, and next by making difficult its own amendment. It was intended, as expressed by Chancellor Kent, that "time shall be given for mature deliberation upon questions arising upon the constitution, which are always momentous in their nature, and calculated to affect not the present generation alone, but their distant posterity."

An illustration of the evil to which I refer may be found in the experience of some of our states with constitutional prohibition. However wise and necessary prohibition may be, the proper place for this much controverted restriction is in statute, not constitutional law. Dependent for its enforcement upon statute law and a sustaining public sentiment, it gains little by constitutional recognition, while the constitution itself may suffer by the evasions and opposition of a discontented people unable, lawfully, to assert their will. Referring to this danger a distinguished jurist has forcibly said, "A constitu-

tion is not a code, civil or penal; and whatever tends to turn it into one, endangers its ultimate stability by exposing it to every gust of popular excitement or caprice. . . . To put into a constitution a rule which a statute would sufficiently prescribe, and which must be supplemented by a statute to make it effective, would be simply to take advantage of the greater permanency of the organic law in the interest of a majority—for a purpose quite foreign to the purpose of that instrument; and might well argue a distrust, on the part of that majority, of their ability to maintain their ground in the convictions of the people. If this be its significance . . . it would exemplify that tyranny of the majority which the friends, as well as the foes, of democratic institutions concede to be their greatest inherent danger."

If I am right in my criticism, it must be that certain fundamental principles determine the true scope and office of constitutional law. I believe such principles have been evolved out of the experience and struggles of the past; and, speaking broadly, may be defined as the principle of control which establishes the frame of government, and the principle of compact which determines its form, guarantees important rights and leaves to the people, through power over legislation, full power of self-government. Upon these principles were based the typical constitutions of Massachusetts and Virginia, and upon them alone still they rest.

If it be argued that the modern expansion of constitutional duties is due to mistrust of representative government, and severe constitutional limitations are necessary for the public welfare, I can only answer that the argument is a confession of the failure of our institutions and an indictment of the integrity of our national character, against which I protest, and which will not be remedied by constitutional provisions. For let us remember in the words of the wise philosopher I have so often quoted, that "institutions are made of men; that men are the struts, ties and bolts, out of which they are framed; and that, dovetail and brace them as we may, it is their nature which must finally determine whether the institutions can stand. Always there will be some line of least

resistance, along which, if the humanity they are wrought out of be not strong enough, they will give way, and, having given away, will sink down into a less trying attitude. . . . No philosopher's stone of a constitution can produce golden conduct from leaden instincts. No apparatus of senators, judges and police can compensate for the want of an internal governing sentiment. No legislative manipulation can eke out an insufficient morality into a sufficient one. No administrative sleight of hand can save us from ourselves."

The above address was delivered at the recent Commencement of the Yale Law School by Governor Russell, by whose permission it is here printed.—*Ed.*

A LAST WORD ON CONSTITUTIONAL CONSTRUCTION.

By Richard C. McMurtrie, LL.D.

That there are two standards of constitutional law is evident. They appear to be inconsistent when we see them applied by the judiciary and they are so, but this does not warrant the inference that the standards are faulty. When we compare the modern utterances of judges when assuming the power of disregarding the voice of the State speaking by the legislature, with the severe logic of those who first demonstrated the right of the judiciary to exercise this transcendent power, it seems impossible to find a reason to justify the apparent assumption of the right to limit the power of the State, by what seems to be so evidently the arbitrary and capricious opinions of the occupants of the Bench for the moment. The fact that there is an ethical basis for the opinion is lost sight of because the attention is occupied in the endeavor to find a justification for its application. All men accustomed to think in the ordinary lines would agree in denouncing a court that would refuse to carry into effect a law involving capital punishment because in their opinion such legislation was nothing but a survival of a barbarous age and of a cruel and blood-thirsty people. But